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CHARLES ELMOSE CROPLEY
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IN THE
Supreme Court of the United States
October Term, 1940

THE UNITED STATES OF AMERICA,
Appellant,
against

WILLIAM L. HUTCHESON, GEORGE CASPER
OTTENS, JOHN A. CALLAHAN and JOSEPH
AUGUST KLEIN,
Appellees.

No. 43

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE APPELLEES

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December, 1940.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED
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BRIEF FOR THE APPELLEES

This is an appeal direct to this Court under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended, 18 U. S. C. § 682, commonly known as the Criminal Appeals Act, and under § 238 of the Judicial Code as amended, from a decision by the District Court of the United States for the Eastern Division of Missouri sustaining the separate demurrers of the defendants (R. 13-16) to an indictment (R. 1-12) charging them with violation of Section 1 of the Sherman Act, as amended (c. 647, 26 Stat. 209, 15 U. S. C. § 1).

The opinion of the District Court (R. 17-22) is reported in 32 F. Supp. 600.

The order of the District Court dismissing the indictment was entered on April 1, 1940 (R. 22). On the same day an order was made allowing an appeal (R. 25-6).

Statute Involved

The indictment is based on Section 1 of the Sherman Act, as amended (c. 647, 26 Stat. 209, 15 U. S. C. § 1).

This statute is set forth in the appendix to the Attorney-General's brief, pages 67-72.

Question Presented

Does the indictment state facts constituting a violation of Section 1 of the Sherman Act?

The Indictment

The appellant's brief concedes that the charge in the indictment grows "out of a jurisdictional controversy between two rival unions" over certain construction work in the local plant of the Anheuser-Busch Company in St. Louis, Mo. (pp. 5-7). The claim is that "the jurisdictional strike which stops the commerce of an employer who is trying to be fair to organized labor" is a violation of Section 1 of the Sherman Law (p. 59).

In the indictment there is no allegation that the defendants have indulged in violence, threats of violence, trespass against property, or criminal acts (other than the so-called "conspiracy").

There is no allegation that the labor organization has been "used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices"—to quote the *Apex* decision (310 U. S. 469, 501).

There is no allegation of any intent "to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market"—again to quote the *Apex* decision (p. 497).

There is no allegation that the alleged activities of the labor organizations had any object other than "to enforce their demands against the employer" as to certain future work in its plant in St. Louis—again to quote the *Apex* decision (p. 487).

There is no allegation that the activities of the labor organizations alleged to have affected interstate commerce "were directed at control of the market and were so widespread as substantially to affect it"—again to quote the *Apex* case (p. 506).

We are thus particular in calling attention to what the indictment does *not* allege because the appellant's brief attempts to write into it much that is not really there. By the use of such opprobrious terms as "ruthless economic warfare", "aggressive tactics", "brutal use of power", "secondary boycott", "force", "coercion", "nation-wide", etc., the appellant's brief attempts so to inflate with words the simple episode of a local labor conflict told in this indictment as to balloon it above the devastating effect of the *Apex* decision, rendered since the order appealed from was made.

The indictment tells this very simple story:

The Anheuser-Busch Company, in February, 1939, submitted to the Borsari Tank Corporation a proposal for the construction "of an additional tank building" on its premises in St. Louis; and, in July, 1939, contracted with Borsari for its erection (par. 15).

The Gaylord Container Corporation was lessee from the Anheuser-Busch Company of a portion of those premises. In August, 1939, it contracted with the L. O. Stocker Company for the erection of "an additional office building on the premises" (pars. 16, 18). Since such additional building would be on the land of the Anheuser-Busch Company it would belong to that company on erection and revert to it at the end of the lease.

The proposed erection of the "additional tank building" brought contention in the Anheuser-Busch plant between the millwrights and machinists employed in the plant, through their respective labor organizations, over the jobs in erecting, assembling and installing certain machinery in the "construction being performed and about to be performed for Anheuser-Busch, Inc. by independent contractors including the construction of the proposed tank building about to be performed by Borsari Tank Corporation of America" (par. 29).

Anheuser-Busch refused the request of the millwrights for this work, and on April 15, 1939, made a one-year contract with the machinists awarding all this work* exclusively to them (par. 21). Thereupon the labor union to which the millwrights belonged, to wit: the Carpenters District Council of St. Louis, which was the local organization of the United Brotherhood of Carpenters and Joiners of America, did the following things:

1. "Called a strike of the millwrights, carpenters and cabinet makers in the plant" on June 28, 1939 (par. 31).

2. "Caused the premises of Anheuser-Busch, Inc. in the city of St. Louis, Missouri", including the portion thereof occupied by the Gaylord Container Corporation, "to be picketed by persons bearing umbrellas and charging Anheuser-Busch, Inc. to be unfair to organized labor" (par. 31).

3. Refused to work for Borsari Tank Corporation on the "construction of the tank building", and refused to work for the L. O. Stocker Company on "the construction of an additional office building for Gaylord Container Corporation" on the premises of the Anheuser-Busch Company (pars. 33, 34).

4. Published in "The Carpenter", an official periodical publication of the United Brotherhood, a notice "denouncing Anheuser-Busch, Inc. as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing

and drinking said beer" (par. 32). Like announcement was made to other trade unions affiliated with the American Federation of Labor (par. 32).

The indictment alleges that "the object and purpose" of this union activity were to induce the Anheuser-Busch Company

"to employ millwrights of United Brotherhood of Carpenters and Joiners of America instead of machinists to perform the work of erecting, installing and setting of machinery" (par. 28).

Neither the Local nor the National Carpenters Union is indicted. The only defendants are William L. Hutcheson, General President of the United Brotherhood; George Caspar Ottens, General Representative of the United Brotherhood; John A. Callahan, Secretary of the Carpenters District Council of St. Louis; and Joseph August Klein, Business Representative of that Council. The only specific charge against Mr. Hutcheson (as distinct from the general charge of conspiracy) is that on June 28, 1939, the other three defendants, at his "direction" and with his "approval", "communicated an ultimatum to Anheuser-Busch, Inc." and "called a strike" (pars. 29, 31).

The indictment reflects the opinion of the pleader that the machinists had a better right than the millwrights to do this work in the additional tank building, but even its own language of advocacy does not conceal the fact that there could be and were two sides to the story (pars. 19-23).

The indictment does not allege that the long-standing dispute between the national organizations of the millwrights and the machinists over work of this character was maintained by the former in bad faith or without color of merit. The alleged agreement to arbitrate is not alleged to have applied to a matter of jurisdiction, particularly over new work and as to new jobs; and, in any event,

it had been nullified by the unilateral action of Anheuser-Busch on April 15, 1939, in awarding and contracting this work and these jobs exclusively to the machinists (par. 21). (See Point IX, p. 52, *post*.)

Of course, the indictment uses many more words than we have used in the above simple narrative. It endeavors by much language of opprobrium and by the lavish use of characterizations and conclusions, to give to this simple labor conflict in a single branch of work in a single local plant in St. Louis as monstrous an appearance as the reflection from a curved mirror.

The appellant's brief cites no decisions in any Federal Court (before or since the *Apex* case) holding that such facts as are alleged in this indictment constitute a crime under Section 1 of the Sherman Law. Rather the position of the appellant's brief seems to be that those facts *should* constitute a crime under *some* law, because (p. 60):

"It is essential to the growth of an intelligent labor movement that *competing* unions should not succeed or fail solely with reference to their ability to bring pressure against each other." (Italics ours.)

This, we believe, is the first time that it has been suggested that the Sherman Law penalizes "competing"!

Certainly, an interpretation of the Sherman Law which penalizes competition for jobs but demands competition in goods is a new and anomalous conception. The anomaly is further high-lighted by the very *reductio ad absurdum* to which it ultimately drives the appellant's own brief, to wit: that it is not a crime under the Sherman Law to "strike to achieve unionization" by depriving non-union laborers of their employment, but it is such a crime to strive "to deprive members of another union of their employment" (p. 58). We leave it to the appellants to reconcile this extraordinary distinction with familiar constitutional guarantees and with their own quotation at

page 48 from a leading English case that "the common law abhors all monopolies which prohibit *any* from working in any lawful trade." (See Points II and VI, pp. 21 and 42, *post.*)

Decision of the District Court

The District Court in its opinion below measured the sufficiency of the indictment against two established criteria which it stated as follows (R. 18):

"In order to charge the defendants with the commission of a crime under the Sherman Act the indictment must not only allege sufficient facts to show a conspiracy to cause a direct restraint upon interstate commerce, as distinguished from a remote or incidental restraint (*Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; *Levering & Garrigues Company v. Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062), but must also show that defendants' activities were unlawful, outside the scope of the legitimate objects and means that may be sought and employed by labor unions under the sanction of the Clayton Act. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196."

Thus measured, the factual allegations of the indictment as to each and every activity of the defendants were held to show no offense against the Sherman Law.

With respect to such interference with commerce as may have resulted from these activities, the court held that the first criterion had not been met, because such interference (if any) was merely incidental, indirect and remote,—citing (R. 19):

Levering & Garrigues Company v. Morrin, *supra*;
United Leather Workers v. Herkert & Meisel, 265
 U. S. 457;

Industrial Association v. United States, 268 U. S. 64;
United Mine Workers v. Coronado Coal Co., 259 U. S. 344;
Leader v. Apex Hosiery Company, 3 Cir., 1939, 108 Fed. (2d) 71..

With respect to the alleged boycott of Anheuser-Busch beer, the court held that the second criterion had not been met, because (R. 20):

"The means used by defendants are not shown to be unlawful. Publication of notices that Anheuser-Busch was unfair to organized labor and requests to withdraw patronage from the products of that company was a direct boycott, lawfully carried out. No secondary boycott of customers purchasing the company's products is disclosed."

With respect to the Attorney-General's contention that a "jurisdictional strike" is not one of "the legitimate objects" "immunized by the Clayton Act, no matter how lawful the means employed, the court held to the contrary and also pointed out that the jurisdictional strike was immune (as long as the means employed were lawful) under the "Public Policy Declared" in, and under the other provisions of, the Norris-La Guardia Act of 1932, 29 U. S. C. A., Section 101 *et seq.*, enlarging the scope of Section 20 of the Clayton Act, 29 U. S. C. A., Section 52. In support of this view the Court cited (R. 20, 21):

New Negro Alliance v. Sanitary Grocery Company, 303 U. S. 552;
Lauf v. E. G. Schinner & Company, 303 U. S. 323;
Blankenship v. Kurfman, 96 Fed. (2d) 450 (C. C. A., 7th Ct.);
Terrio v. S. N. Nielsen Construction Company, 30 Fed. Supp. 77 (D. C. La., 1939).

Because of this civil immunity the Court said (R. 22):

“That which does not amount to a civil wrong can hardly be characterized as criminal.”

The true nature of the so-called conspiracy was analyzed and epitomized by the Court when it said (R. 19):

“The real purpose of the defendants, as disclosed by the indictment, was not to restrain commerce, but to prevail in a local labor controversy. The Congress has not declared that a dispute of the nature alleged is unlawful. By the indictment it is sought to punish the defendants for what is conceived to be an unwarranted interference with a local industry, *under the pretense that by the dispute interstate commerce was restrained.*” (Italics ours.)

Summary of Argument

1. Implicit in the prosecution's case is the novel theory that when a local strike lessens temporarily and to some degree the movement of the employer's interstate commerce, the rights and wrongs thereof should not be left to the local laws and authorities, but should be policed by the Federal Government and should be determined by criminal prosecution under the Sherman Law. (See Point I, p. 13, *post.*)

This theory would bring nearly every defensive or offensive activity of organized labor under centralized governmental control; expose it to the sociological and economic conceptions prevailing for the time being in the Department of Justice; and reverse the public policy of this country as declared with increasing emphasis by Congress.

As said in the *Apex* case (310 U. S. 469, 512):

“These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the

Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers'."

2. The appellant's condemnation of the "jurisdictional strike" on alleged social and economic grounds would be germane only in Congress and the State Legislatures. (See Points II and III, pp. 21 and 26, *post.*)

Whether or not Congress has the constitutional power to broaden the Sherman Act "to apply to all labor union activities *affecting* interstate commerce" (*Apex*, p. 489), it has left standing the broad and striking difference between the language of that Act and the reference in the Wagner Act to conduct "*affecting*" interstate commerce. It has never attempted to condemn labor activities as such, unassociated with illegal acts and planned and direct restraint "as the means or instrument for suppressing competition or fixing prices" (*Apex*, p. 501).

3. The procurement of employment is a "legitimate object" of a labor union, both at common law and under Sections 6 and 20 of the Clayton Act; and it is also part of and necessarily implied in the "mutual help" for which, under the Clayton Act and the Norris-LaGuardia Act, a labor union may have with immunity "existence and operation." (See Points IV, V and VI, pp. 33, 37 and 42, *post.*)

The fact that, as a result of such competition for employment, other laborers, whether organized or not, may not obtain (or even lose) jobs, is, as said by the Court of Appeals of New York in the leading case on jurisdictional strikes (*Stillwell Theatre v. Kaplan*, 259 N. Y. 405, 412): "conduct which is within the allowable area of economic conflict."

Indeed, such gains and losses by different individuals are the inevitable consequences of the competitive system itself, whether in goods or in services, and are part of the price which we pay for industrial freedom. A system which presupposes that centralized government can and must determine what activities of labor are "justified" would constitute not Democracy but Fascism.

4. The acts which are charged in this indictment as having been done by the defendants are among the very acts which are specified in Section 20 of the Clayton Act as not to be "considered or held to be violations of any law of the United States." (See Point V, p. 37, *post.*)

5. The acts which are charged in this indictment as having been done by these defendants fall under the protection of Section 2 of the Norris-LaGuardia Act (U. S. C. A, Title 29, Sec. 102) entitled "Public Policy in Labor Matters Declared," and also under the protection of Sections 4, 5 and 6 of that Act listing labor activities which no federal court may enjoin at the suit either of the Government or of private persons. (See Point V, p. 37, *post.*)

6. Whether or not this strike at the Anheuser-Busch premises in St. Louis violated anyone's rights at civil law, it neither was nor could be a crime under the Sherman Law "even though a natural and probable consequence of their [the strikers'] acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer" (*Apex*, p. 487). In point of fact such strike was not a restraint of trade at all, either at common law or under the Sherman Law. (See Point I, p. 13, *post.*)

7. Whether or not the labor organization violated anyone's rights at civil law by urging its members and the friends of labor to refrain from purchasing Anheuser-

Busch beer, such conduct was not criminal, either at common law or under the Sherman Act. Moreover, in point of fact and of law, no civil right was violated. (See Point VII, p. 44, *post.*)

8. The indictment contains no allegation that the acts of the defendants "were directed at the control of the market and were so widespread as substantially to affect it" (*Apex*, p. 506).

9. The indictment alleges no acts by the defendant which, by restraining "free competition in business and commercial transactions," "tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services" (*Apex*, p. 493).

10. The indictment not only does not allege that the purpose of the defendants was to exploit the public through the suppression of competition in the market or the raising of prices, but, on the contrary, it specifically alleges that "the object and purpose" of the defendants was to induce the Anheuser-Busch Company

"to employ millwrights of United Brotherhood of Carpenters and Joiners of America, instead of machinists, to perform the work of erecting, assembling, installing and setting all machinery" (par. 28).

This purpose was not one of the purposes which the Sherman Act was enacted to penalize, and, even if it had been, it was subsequently immunized by the Clayton Act and the Norris-LaGuardia Act.

11. The sufficiency of the indictment must be judged by the facts actually alleged and not by words of opprobrium, characterization or conclusion. (See Point V, p. 56, *post.*)

POINT I

The appellant's brief devotes itself to a wholly unsuccessful effort to escape from the *Apex* decision.

It is a frank and unwarranted attempt to confine that decision to merely one of the points contained therein.

(1) The appellant's brief makes almost no analytical reference to the opinion below.

The burden of the brief is the *Apex* decision by this Court, rendered after the decision below. Of the *Apex* decision the appellant's brief says (p. 40):

"It is true that the opinion in the *Apex* case does contain language which, read apart from the background of the particular facts which the Court was considering, would militate against our position in this case."

We would have assumed that "the background of the particular facts which the Court was considering" in the *Apex* case was far more favorable to the appellant's contentions than the facts of the commonplace and peaceful walkout and proclamation of unfairness to labor set forth in this indictment.

We would have assumed that the *Apex* decision would have been acknowledged to be an authority *a fortiori*.

(2) But the appellant's brief says that the *Apex* decision is distinguishable for various alleged factual reasons, all of which we say are mistaken, illusory and irrelevant.

In the first place, the appellant's brief says (p. 16):

"The acts charged to the defendants are not merely local activities conducted in a single factory and subject to the supervision and control of the local authorities. The indictment in this case charges rather that

a restraint of trade has been imposed as a result of a jurisdictional dispute between two national unions and that this dispute has resulted in many different strikes in many different places which have imposed a direct and unreasonable burden upon interstate trade."

But such is not at all the accusation for which this indictment summons for trial these defendants (four individuals, not the "two national unions"). The accusation against these individuals does not begin until paragraph 24. That accusation is nothing at all factually but that these defendants (union officers) conspired to "induce and coerce" a local employer to employ members of their union in the future handling of certain local work about to become available in the employer's plant in connection with some proposed new local construction; and that to this end they participated in calling a strike at the local plant, in picketing the local premises and in urging all union members and friends of organized labor to refrain from purchasing and drinking Anheuser-Busch beer.

Each one of these acts was the traditional garden-variety of peaceful effort by a labor union to "operate for mutual help" by gaining increased employment for its members in the form of a few new local jobs in a local plant. The union was not even seeking to unionize for itself the whole plant. Nor was it seeking to intrude itself into the plant, for it was already there. It was merely seeking to defend for its members certain future work therein which it believed to belong rightfully to them and which the employer was proposing to give and ultimately did give to others.

The references in the indictment to the alleged fact that between the National Union of Carpenters and the National Union of Machinists there had been for a great many years a long standing dispute as to jurisdiction over the work of erecting and dismantling machinery, are merely historical. Certainly these four individual defend-

ants are not summoned to trial for that ancient dispute; and there is no allegation that either of the National Unions maintained its side of the dispute in bad faith or as a conspiracy, criminal or otherwise. The four defendants are accused solely of a local action in local premises except in so far as they are accused of participating in a general proclamation that in their union's opinion Anheuser-Busch was unfair to organized labor and hence its beer should not receive the patronage of the friends of organized labor.

(3) The appellant's brief also attempts to distinguish the *Apex* case by saying (p. 17):

"In the second place, the objective of the conspiracy was not the protection and advancement of the rights of labor, such as collective bargaining, wages, hours, or working conditions; it was rather to win by force a jurisdictional dispute with another union and to deprive the members of that other union of work."

But that was the very object of the lawless and invading union in the *Apex* case! It sought by violence to obtain for its union members jobs already held by others. In the present case, the Anheuser-Busch Company on April 15, 1939, in complete disregard of the known claims of its millwrights, had undertaken to award the new work of this character in the proposed new tank building to the machinists. Hence it was the employer and the machinists who had deprived the millwrights of possible future employment—not the other way round (par. 21).

In the *Apex* case the accused union, unlike the union in the present case, was not already in the plant and was not already recognized by the employer. In the *Apex* case the employer had contracts of employment in its Philadelphia plant with "about twenty-five hundred persons,"—far more than the Anheuser-Busch Company is said to have employed in its St. Louis plant. Of these twenty-five

hundred persons only eight were members of the defendant union. Nevertheless, the defendant union demanded a closed shop agreement as against all the other employees; and, when that demand was refused, it violently invaded and took possession of the plant with the aid of members of the union employed by other employers. In the present case there is no allegation that there was any invasion or seizure of property, or even that the peaceful picket line was composed of persons other than employees in the plant.

The appellant's brief claims—and this is its basic claim—that the so-called “rights of labor” are limited to “collective bargaining, wages, hours, or working conditions” (p. 17). The indictment proceeds on the same theory (pars. 23, 27). The appellant's brief refuses to acknowledge that the oldest and most traditional of “the rights of labor” is to secure and protect employment, for without employment the subsequent and consequential “rights” which the appellant's brief does acknowledge would never come into existence at all.

Our claim is that the common law, the Clayton Act, the Norris-LaGuardia Act and the Federal Constitution recognize and immunize this primary and fundamental right. (See Points III, IV and V, pp. 26, 33 and 37, *post.*)

In so far as the appellant's brief seems to believe that that kind of a labor dispute known as a “jurisdictional dispute” is outside of these common law rights and statutory immunities and is outlawed and criminal under the Sherman Law because it is a form of “competing” between unions for employment (p. 58), we will show in the succeeding Points that any such contention is contrary to the common law, contrary to the express statutory immunities, and contrary to every decision in the cases where any attempt has been made to penalize the jurisdictional strike under the Sherman Law; and is irrelevant. (See Points II and III, pp. 21 and 26, *post.*)

(4) Finally, in an effort to distinguish the *Apex* case, the appellant's brief says (p. 37):

"In the third place, the objective of the union in this case was sought to be achieved not, as in the *Apex* case, by interfering with the business of the other party to the dispute, but by stopping interstate trade to or by four companies, with only one of which it had any relation and against none of which it had any real grievance."

This misstates both the *Apex* case and the present indictment, and is also irrelevant.

In the *Apex* case the defendant union had no "grievance" at all against the Apex Hosiery Company, for of the latter's twenty-five hundred employees only eight belonged to the defendant union. Nor in the *Apex* case did the defendant union have any dispute with the other 2,492 employees in the plant, whose jobs the invading union sought to obtain by violence; and there was no question at issue as to "the right" to perform the work which any of them were doing.

Moreover, it is not true that in the *Apex* case the defendant union was merely "interfering with the business of the other party to the dispute." This Court was a pains to explain that in point of fact:

"The effect of the sit-down strike was to restrict substantially the interstate transportation of its [the petitioner's] manufactured product" (p. 484).

On the other hand, this indictment does not even allege that the defendants sought the discharge of anyone. The indictment itself makes clear that the dispute centered in the future doing of new work, to wit, the installing of certain machinery in the new tank building about to be constructed on the premises.

There is nothing to show that had Anheuser-Busch awarded this future work exclusively to the millwrights in-

stead of awarding it (as it did) exclusively to the machinists, it would have been obliged to have dropped any machinist already in its employ. Indeed, the indictment specifically alleges that on June 28, 1939, at about the time when the Anheuser-Busch Company let the contract for the erection of the new tank building (par. 15) and when the strike was commenced (par. 31), it already had in its employ "approximately eighty machinists" (par. 20). These machinists were, for all that appears, the ordinary number required for the ordinary work of the existing, unenlarged Anheuser-Busch plant.

Finally, it is not true that the Carpenters Union had "relation" only with the Anheuser-Busch Company—although, if true, the fact would be irrelevant.

The work of constructing the additional tank building was, by the arrangement of Anheuser-Busch, to be carried on through the Borsari Tank Corporation as its representative; and hence the employment had to be sought under or in connection with that corporation. The Gaylord Container Corporation was the lessee of office space in the building of the Anheuser-Busch Company on the very same premises (p. 16), and the Gaylord Container Corporation was proposing, through the L. O. Stocker Company, to enlarge its office space on the premises so leased (par. 18). The enlarged building would belong to the Anheuser-Busch Company. (See Point VIII, p. 48, *post.*)

Whether or not the grievance of the Carpenters and Joiners Union was a "real grievance" is even more irrelevant to the issue of the application of the Sherman Law than was the absence in the *Apex* case of any grievance at all on the part of the defendant union. But under a later Point we shall show that the grievance of these millwrights was far more "real" than the appellant's brief implies. (See Point IX, p. 52, *post.*)

(5) On the side of the law, the appellant's brief tries to confine the *Apex* case to only one of the points made in the opinion.

Again and again the brief says (pp. 18, 40, 43):

"The test laid down in that case [Apex] is whether the restraint is 'upon commercial competition in the marketing of goods or services'."

By way of attempting to distinguish the facts of the present case, the brief then says (p. 42):

"The effect of all these activities [by the defendants] was to impair the power of Anheuser-Busch to compete in the interstate market. The obvious purpose was to apply economic pressure to Anheuser-Busch by depriving it of the power to meet the competition of other companies engaged in the same line of business."

But, *a fortiori*, such were both the "effect" and the "purpose" in the *Apex* case. There, to quote the opinion (p. 483):

"When the plant was seized, there were on hand 130,000 dozen pairs of finished hosiery, of a value of about \$800,000, ready for shipment on unfilled orders, 80 per cent. of which were to be shipped to points outside the state. Shipment was prevented by the occupation of the factory by the strikers. Three times in the course of the strike respondents refused requests made by petitioners to be allowed to remove the merchandise for the purpose of shipment in filling the orders."

Thus, in the *Apex* case there was not merely impairment but destruction of the power of the Apex Hosiery Company "to compete in the interstate market." The intention was, by depriving it of the power to meet the competition of the market, "to apply economic pressure."

Moreover, in the *Apex* case, unlike the present case, there was a complete stoppage of *all* interstate shipment and commerce by the Apex Hosiery Company.

Furthermore, the complete stoppage of the ability of the Apex Hosiery Company to fill its huge existing orders from other states necessarily meant that those orderers would, in turn, be restrained and straitened, if not stopped, in *their* interstate commerce.

The appellant's brief attempts to make much of its utterly mistaken and irrelevant claim that the union in the present case had no grievance as regards the Gaylord Construction Company and the L. O. Stocker Company. But the defendant union in the *Apex* case had no grievance *at all* against anyone—certainly not against those buyers in other states who had placed unfilled orders for 80 per cent of the 130,000 dozen pairs of finished hosiery on hand.

(6) On November 4, 1940, the Circuit Court of Appeals for the Second Circuit, in *United States v. Gold, et al.*, reversed the judgment of conviction on the authority of the *Apex* decision. In interpreting the *Apex* decision the Circuit Court unanimously said:

“That can only mean that unless the strike is so ‘widespread’ as to affect prices or supply, it is not ‘restraint of trade’, even though it is directed against the ‘marketing’ of goods or services.”

A full statement of the facts in the *Gold* case is embodied in the opinion of the Circuit Court of Appeals, a copy of which is printed in the Appendix hereto.

POINT II

The attack by the appellant's brief upon the "jurisdictional strike," is wholly unsound and irrelevant in law. We are not here concerned with social and economic questions and reforms which lie within the jurisdiction of Congress and the States Legislatures.

If, as the brief claims, the Sherman Law applies equally to capital and labor, how can non-competition between industrial concerns be a crime under that law and yet competition between labor unions be also a crime?

(1) The appellant's brief attempts a dogma that the conceded right to strike for "unionization" of a shop or industry (—a form of strike which preeminently is one to establish jurisdiction—) does not apply where the jobs in question are sought or already held by "members of another union" (p. 58).

It seems to be the appellant's position that any peaceful attempt by the members of one union to obtain work which they think is rightfully theirs and of the class for which their union was organized and upon which its welfare depends, is legitimate where their competitors or the existing job-holders are non-union men, but it becomes illegitimate if the members of some other union seek the same work or have been successful in being the first to negotiate an exclusive contract with the employer (p. 58).

Since in the Federal field all crimes are statutory, what statutory authority is there for such arbitrary differentiations between innocence and criminality? Mere name-calling or sociologizing cannot sustain this indictment.

Are we to understand that the Attorney General takes the position that the jobs of non-union members, or their opportunities for jobs, are less precious and sacred under the law than those of union men?

Suppose the jobs in question were held by an independent "inside union" or even by a so-called "company union". Are we to understand that, in the eyes of the Attorney General, an effort by another union to secure those jobs for its own members is a crime against the anti-trust laws?

Or suppose the jobs in question were held by a C.I.O. union. Are we to understand that, in the eyes of the Attorney General, an effort by an A. F. of L. union to get those jobs for its own members would be such a crime? In other words, just where does the Attorney General propose to draw the line, and on what statutory authority would his drawing of any such line rest?

Every employment (whether of union or non-union men) necessarily rests on some contractual basis and, indeed, constitutes a contract *per se*. Hence, since the appellant's brief concedes that a union may lawfully exert economic pressure to induce or coerce termination or breach of such contracts by the employer with non-union men, the element of contract cannot be the basis of the arbitrary distinction which the appellant's brief is seeking to make as between union and non-union employers.

(2) The appellant's brief says (p. 59):

"It is difficult to imagine any form of labor warfare so opposed to the public interest and to the interest of organized labor as the jurisdictional strike which stops the commerce of an employer who is trying to be fair to organized labor."

We would assume that, with the *Apex* case in mind, imagination would not have been so difficult as the brief asserts.

But is the jurisdictional dispute or strike always what the appellant's brief asserts? Is it possible to dogmatize even sociologically?

For the last eight years, without any fault of laboring men, organized or unorganized, there have been 10,000,000 to 12,000,000 people continuously out of work in this country. Their capacity to support themselves and their families is necessarily the subject of fierce competition for employment. Self-respecting laboring men prefer jobs to the dole.

We may deplore the existence of this vast, continuous and unsolved unemployment. Inevitably it sets men one against the other in the competition for jobs. But the responsibility for that condition rests elsewhere than with labor.

Every union, therefore, as long as these tragic economic conditions are unremedied, is under great and easily understandable economic pressure in the competition for jobs to secure employment for its own members and, to this end, to protect its jurisdiction over the field of work for which it was organized.

If Government and Industry have failed to remedy these basic economic conditions and compulsions, which rest more heavily on the back of labor than on any other class in the community, it would scarcely seem in order to create, through indictment, a semblance of responsibility upon the part of labor and to invoke the penal law against economic necessity. Acceptance of such extreme procedure would seem to be a confession of mental pessimism, if not bankruptcy, as regards the possibility of progress through the democratic processes of conciliation, mediation, arbitration and regulation which are already under statutory development by Congress in the labor field.

The criminal provisions of the Sherman Law were never intended to be the means of regulating all American capital and labor, and of drawing into bureaucratic supervision and control all their problems and behavior, on the theory that what is not "reasonable" is a crime.

Reform is always a laudable passion, but interpreting matters of policy in terms of criminology has all the axiomatic dangers of the hasty short-cut.

(3) Much of the difference between Fascism and Democracy lies in Government's attitude toward Labor. Fascism presupposes that centralized government must dictate administratively what activities of labor are "justified", whereas the attitude of Democracy is thus defined in the annual report of the Secretary of Labor for the fiscal year ended June 30, 1937:

"Labor policy in a democracy is not a program conceived by a government, but rather a program which wage earners and employers must work out together in a society which develops naturally out of the work they do and the life they lead."

(23 *Corpus Juris*, p. 102, says: "The federal courts take judicial notice of the reports and official correspondence of the heads of the federal executive departments.")

The Fascist view stands for rigid regimentation and total discipline, gradually telescoping into slavery to the state autocrat. The Democratic view has faith that, while the liberty of the working man may entail certain economic frictions and conflicts, the contribution to Democracy is worth the price.

(4) The opposing brief constantly declares that "the jurisdictional strike" has been denounced by labor leaders themselves and quotes a phrase or two excised from context (p. 59). In consequence, it seems both necessary and appropriate that we should place before the Court the most recent and authoritative labor expression on the subject, to wit: that adopted and published earlier this year by the Executive Council of the American Federation of Labor, in an announcement from which we extract the following:

"The Department of Justice has embarked on a deliberate, nation-wide drive to place organized labor under the thumb of the Federal Government.

"Within the past few months the Department of Justice has obtained twelve indictments involving thirty-five unions and a large number of their officers and members.

"We charge that these prosecutions have been undertaken contrary to the plain provisions of the Clayton Act and in complete disregard of the unmistakable intent of Congress, when it adopted that law in 1914, to exempt labor organizations from the provisions of the Sherman Anti-Trust Act. * * *

"Among the legitimate activities of unions which the Department of Justice already has sought to forbid by means of prosecution under the antitrust laws is that form of union competition known as a jurisdictional dispute.

"Imagine a law which was designed to permit free competition in business being used to end competition in labor! * * *

"The American Federation of Labor deprecates jurisdictional disputes as much as anyone else. They result largely from the technological displacement of workers by new inventions and new industrial techniques. The consequence frequently is bitter competition among workers and their organizations for the jobs still available.

"The American Federation of Labor settles numbers of jurisdictional disputes each year and its unions are constantly seeking amicable means of adjustments. But we have never before encountered the theory that jurisdictional disputes are illegal or that the organizations involved can be punished under the antitrust laws.

"The Executive Council serves notice that the American Federation of Labor will resist with all the power at its command the present reactionary efforts of the Department of Justice to control organized labor. * * *

"This is an issue of primary importance to every American worker and every American citizen. Once the independence of our trade unions is invaded, once

they are subjected to rigid Government control and domination, the democracy of our country is threatened and Government dictatorship will become a reality. We have seen what happened in Russia, Germany and Italy when these Governments took over control of the labor movement. We are determined not to let that happen here."

POINT III

There are multitudinous decisions holding that a jurisdictional strike is not an offense, criminal or even civil, against the Sherman Law. There is no decision to the contrary.

Although *Terrio v. S. N. Nielsen Const. Co.*, 30 Fed. Supp. 77, is the most recent case on the subject, the cases have been legion which have held that the acts charged are not offenses, criminal or even civil,—especially not offenses against the Sherman Law.

Levering & G. Co. v. Morrin, 289 U. S. 103;

United Leather Workers v. Herkert, 265 U. S. 457;

Senn v. Tile Layers Union, 301 U. S. 468;

Lauf v. E. G. Schinner & Co., 303 U. S. 323;

Blankenship v. Kurfman, 96 Fed. (2nd) 450;

United Chain Theatres v. Philadelphia Union, 50 Fed. (2nd) 890;

Allen v. Flood, House of Lords 1898;

Pickett v. Walsh, 192 Mass. 572;

Kemp v. Division No. 241, 255 Ill. 213;

Exchange Bakery & Restaurant v. Rifka, 245 N. Y. 260;

Stillwell Theatre, Inc. v. Kaplan, 259 N. Y. 405;

Nann v. Raimist, 255 N. Y. 306;

Bossert v. Dhuy, 221 N. Y. 342;

National Protective Association v. Cummings, 170 N. Y. 315;

Horman v. United Mine Workers, 166 Ark. 255;

Overland Publishing Co. v. Union Lithograph Co., 57 Cal. App. 366;

Greenwood v. Building Trades Council, 71 Cal. App. 159;

Shaughnessy v. Jordan, 184 Ind. 499;

Roddy v. United Mine Workers, 41 Okla. 621.

In the *Terrio case*, *supra*, the material allegations pleaded as the basis of the conspiracy against the Sherman Law were attempts on the part of the defendants to procure, through coercing the discharge of members of the United Transport Workers, Local Industrial Union No. 806, affiliated with the C. I. O., the replacement of the said C. I. O. drivers of trucks with A. F. of L. drivers or to force the drivers of the C. I. O. union to change their affiliation and become members of the A. F. of L. It was further alleged that the defendants combined and conspired for the purpose of refusing to accept delivery of interstate material unless the same was delivered by A. F. of L. drivers. The Court, on motion to dismiss, first answered the question: "Does complainant assert a cause of action under the Sherman Antitrust Law?" It said (p. 79):

"The next link in the conspiracy to break when the legal test is applied is that the actions of the Teamsters' Union or Building Trades' Union are alleged by complainant as acts of conspiracy in restraint of trade under the Antitrust Act. The Court considers these actions as 'lawfully carrying out the legitimate objects' of these unions.

"Such competition between labor unions is lawful, and the acts pleaded in furtherance thereof, even to the extent of threatening strikes in furtherance of such lawful object, are lawful and proper. There can be no conspiracy to perform lawful acts in further-

ance of a lawful purpose. The allegation that A. F. of L. unions threaten to stop deliveries is tantamount to an allegation that they will engage in a peaceful strike and resort to peaceful economic pressure in furtherance of such strike, and that such activities are legal." (Emphasis ours.)

Thereupon, the Court after citing *Senn v. Tile Layers Union, supra* (which involved the displacement of non-union men), stated (p. 80):

"The above principle established as between the union and the individual, not a member of a union, applies as between the one union and the other union, or as between C. I. O. member and the A. F. of L. member." (Emphasis ours.)

The Court then proceeded to discuss the proper means for settlement of jurisdictional disputes (p. 80):

"Historically, in the United States, the tendency is to make it harder and harder for the activities of labor to form the basis of violation of the Anti-Trust Laws. See Clayton Act of 1914, amending the Sherman Act of 1890.

"Likewise, the present prevailing tendency is to keep the inferior courts of the United States, busy as they already are, from the turmoil involved when they issue injunctive relief in connection with labor disputes. The previous procedure has not proved helpful to labor nor has it served to maintain the dignity of our over-worked federal courts. The Congress very properly created the National Labor Relations Board to act as the judicial tribunal for most all labor disputes. Its field of service is being steadily enlarged through generous decisions broadening the jurisdictional application (citing the Norris-La Guardia Act and cases).

"Complainant's suit falls, therefore, in failing to state a cause of action under the Anti-Trust Laws."

In the *Blankenship* case, *supra*, 96 Fed. (2d) 450, where, in a jurisdictional dispute, one union sought an injunction against another restraining the latter from exerting labor pressure to obtain the work of the former, the Court ordered the bill of complaint dismissed, even though—

“The obvious and sole purpose of their activities was to secure for their group the work which was being performed by the plaintiffs.”

In the *Levering* case, *supra*, 239 U. S. 103, the Supreme Court of the United States found that the purpose of the conspiracy and acts committed in furtherance thereof was to compel the replacement of non-union with union workers by legitimate exertion of labor pressure. This was held to be a purely local and justifiable aim. The fact that the defendants had sought to coerce termination of the employer's contract relations with other workers did not make that aim illegitimate.

In the *Stillwell Theatre* case, *supra*, 259 N. Y. 405, the controversy was between two unions as to which was entitled to furnish the labor for the plaintiff theatres. Although the latter had a contract with the other union, the defendant union picketed the theatres, with the design of forcing them to break their contract with the other union and to employ members of the defendant union. The plaintiffs sought to have the picketing enjoined on the ground that it aimed to force a breach of their contracts with the union then employed. The Court of Appeals, in denying the injunction, said (p. 412):

“We would be departing from established precedent if we upheld this injunction. We would thereby give to one labor union an advantage over another by prohibiting the use of peaceful and honest persuasion in matters of economic and social rivalry. This might strike a death blow to legitimate labor activities. It

is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict."

There is great significance in the fact that the *Pickett* case, *supra*, 192 Mass. 572, is the very case on which, in recommending the Clayton Act, the House Committee relied as containing the most authoritative definition of the "legitimate objects" of a labor union.

In the House Report, accompanying the proposed Clayton Act (C. Doc. 6559, 63rd Congress, 2nd Session, H. R. 2, pp. 14 *et seq.*), this *Pickett* case is cited as showing that at common law members of one union may lawfully strike to coerce an employer to give the work and jobs to them rather than to the members of another union to whom the employer had given the work and the jobs. The House Committee's report quotes at length the portions of the opinion in the *Pickett* case which we set forth below.

There would seem, therefore, to be no possibility of a contention that Congress, in passing the Clayton Act, did not expressly regard a so-called "jurisdictional strike" as one of the legitimate objects of a labor union and hence immunized by the Clayton Act.

Indeed, in referring to the *Pickett* case, the House Report said (p. 31):

"In this connection we cite from the luminous opinion by Judge LORING delivering the opinion in *Pickett v. Walsh* (192 Mass. 572), a clear exposition of our views here expressed. We regret the necessity of limiting the quotation, because the whole opinion could be studied with profit."

In this *Pickett* case the plaintiffs, who were the pointers of masonry, sought to enjoin a union of bricklayers from conspiring to compel the employer to discharge them and engage instead the bricklayers' union to do certain masonry work. The Supreme Court of Massachusetts, in holding that the efforts of the defendants were, under common

and statutory law, within the *legitimate objects* of a trade union, said (the matter quoted being set forth at length in the House Committee Report as aforesaid):

“The case is a case of competition between the defendant unions and the individual plaintiffs for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case therefore is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, on appeal (1892) A. C. 25.

“The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, cannot get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay * * *. There are things which an individual can do which a combination of individuals cannot do. But having regard to the right on which the defendants’ organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants’ rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stones unless they were given the work of pointing them when laid. See in this connection *Plant v. Woods*, 176 Mass. 492, 502, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; *Berry v. Donovan*, 188 Mass. 353, 357, 74 N. E. 603.

“The result to which that conclusion brings us in the case at bar ought not to be passed without consideration.

"The result is hard on the contractors, who prefer to give the work to the pointers, because (1) the pointers do it by contract (in which case the contractors escape the liability incident to the relation of employer and employee); because (2) the contractors think that the pointers do the work better, and if not well done the buildings may be permanently injured by acid; and, finally, (3) because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who cannot lay brick or stone) are concerned, the result is disastrous. But all that the labor unions have done is to say you must employ us for all the work or none of it. * * * They have not undertaken to forbid the contractors employing pointers, as they did in *Plant v. Woods* (176 Mass. 492). So far as the labor unions are concerned, the contractors can employ pointers if they choose, but if the contractors choose to give the work of pointing the bricks and stones to others the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor unions' acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers and masons union on the one hand and the individual pointers on the other hand. But there is competition. There being competition, they prefer the course they have taken. They prefer to give all the work to the unions rather than get non-union men to lay brick and stone to be pointed by the plaintiffs.

"Further, the effect of complying with the labor unions' demands apparently will be the destruction of the plaintiff's business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. It was well said by HAMMOND, J. in *Martell v. White*

(185 Mass. 255, 260), in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: 'Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly.'

"The application of the right of the defendant unions, who are composed of bricklayers and stone masons, to compete with the individuals plaintiffs, who can do nothing but pointing (as we have said) is in the case at bar disastrous to the pointers and hard on the contractors. But this is not the first case where the exercise of the right of competition ends in such a result. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested, but in spite of such evils competition is necessary to the welfare of the community."

POINT IV

The assumption in the opposing brief that Section 6 of the Clayton Act is irrelevant rests in large part upon the substitution of "reasonable" or "justified" for the word "legitimate" in the Act, and upon disregarding that the Supreme Court has defined this word "legitimate" as meaning "normal". It also disregards that portion of the section which expressly immunizes "the operation of labor organizations for the purposes of mutual help".

(1) Except for printing the Clayton Act in an Appendix and for noticing that it was mentioned by the court below (p. 2), the appellant's brief very curiously makes no mention at all of the Clayton Act. This mystifying silence on so conspicuous and relevant a statute is in strange contrast to the appellant's discursiveness on that very same statute in its brief below.

In the appellant's brief below the fulcrum of the reasoning was the statement at page 36:

"It is difficult to imagine anything more directly in restraint of interstate commerce than an unjustified strike or boycott. If these strikes and boycotts are unjustified, clearly an unlawful restraint of that commerce exists."

And at page 102:

"The question in each case is whether the restraint imposed by the labor organization is a reasonable one. * * * After all, 'labor' is merely a word for persons and the Sherman Act makes no distinction as to persons."

Such expressions echo the basic anti-labor arguments before the Clayton Act was passed.

As to the declaration in Section 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce," the appellant's amazing brief below said that it (p. 86)

"cannot be said to have any definite, substantive meaning. Even though this statement was hailed by labor as making the Clayton Act 'Labor's Magna Charta,' it is clear that the members of Congress neither knew what the clause meant nor expected it to be of any great consequence."

This somewhat cynical claim that this famous phrase was but sounding brass and a tinkling cymbal for delighting and deceiving the ear of Labor is in direct contradiction of the following statement by President Roosevelt at the Texas Centennial Exposition in Dallas, Texas, on June 12, 1936:

"The net result of monopoly, the net result of economic and financial control in the hands of the few, has in the past meant and means today, in large measure, the ownership of labor as a commodity. If

labor is to be a commodity in the United States, in the final analysis it means that we shall become a nation of boarding houses, instead of a nation of homes. If our people ever submit to that, they will have said 'good-by' to their historic freedom. Men do not fight for boarding houses. Men do fight and will fight for homes."

(2) We do not believe that there is hidden in the Sherman Law a grant of almost unrestricted power to regulate American industry and the American working millions according to the social, economic and political views of some current official incumbent as to what activity may or may not be "justified", and to enforce and entrench that power by multitudinous indictments and the likelihood thereof. In any event, so vast an official dominion becomes a reality the moment judicial sanction is given to the immense implications inherent in the appellant's present brief and openly avowed in its brief below, to wit, that a strike is criminal (assuming that the employer's business has some elements of interstate commerce) whenever it is "unjustified", and that a labor union is a mere collection of individuals whose product (to wit, labor) is as much susceptible to the Sherman Law as any other commodity or article of commerce.

Heretofore it has always been assumed that a laboring man, whether organized or not, had the same absolute right to choose his employer and to quit his employment as has the employer to hire and fire. But now the amazing doctrine is advanced throughout the opposing brief, both explicitly and implicitly, that the laboring man, when organized in association with others of his class, cannot peacefully quit his employment or boycott his employer, except at the risk that the Department of Justice, his employer or some judge or jury may declare that his action was "unjustified" and inflict a conviction or a treble damage judgment accordingly. That proposition is at the base of every argument in the opposing brief; and, we repeat, it means the end of the freedom of labor.

(3) The Courts have invariably defined the word "legitimate" in the Clayton Act as meaning "normal"—and not as meaning "justified". Thus in *Duplex Co. v. Deering*, 254 U. S. 443, the Court said, concerning Section 6 of the Clayton Act:

"The section assumes the **normal** objects of the labor organization to be legitimate, and declares that nothing in the anti-trust law shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence **and operation**—to be an illegal combination or conspiracy in the restraint of trade."

We venture to believe that if the Supreme Court had held that the statutory definition of the word "legitimate", contained in Section 6 and emphasized in the *Duplex* case, meant "justified" and not "normal", Congress would have moved for an amendment.

The word "normal" means natural as an "operation instituted for the purposes of mutual help."

(4) The Attorney-General's brief below claimed that the dissenting opinion of Judge HOLMES in the *Bedford Company* case (274 U. S. 37) "upholds us on these points" (p. 102). But what Judge HOLMES said was (p. 65):

"If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints on labor which remains us of involuntary servitude."

(5) On page 87 the Attorney-General's brief below brought its ultimate objective out into the open with this statement concerning Section 6 of the Clayton Act:

"It does not refer to the acts of labor organizations or of their members but only to the organiza-

tions and members themselves, as merely protecting them against an unlawful status."

This statement plainly overlooks or suppresses the word "operation" which clearly signifies acts, and also the words "carrying out the legitimate objects thereof" which again clearly signify acts. The consequence would be to convert the whole section into a fraud and the title of the section ("anti-trust laws not applicable to labor organizations") into a downright falsehood.

POINT V

Section 20 of the Clayton Act expressly provides that none of the acts specified therein shall "be considered or held to be violations of any law of the United States."

That section and the subsequent Norris-LaGuardia Act are also fatal to this indictment.

(1) Section 20 of the Clayton Act provides, in part:

*"That no restraining order or injunction shall be granted by any court of the United States or a judge or the judges thereof in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment. * * *"*

A jurisdictional dispute, such as is set forth in this indictment, falls within the very terms of this section, for several reasons:

(a) The story told in the indictment is a "dispute" or "case" between employer and employee.

(b) It is also a "dispute" or "case" between employees.

(c) It is also a "dispute" or "case" between persons employed and persons seeking employment.

(d) It concerns employment and the "terms or conditions of employment."

The millwrights, so the indictment itself says, declined to work on the premises of Anheuser-Busch except on the term and condition that they be employed to do all the work therein which they considered to be within their jurisdiction.

(2) Section 20 further provides:

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

(3) The Attorney-General in his brief below argued that Section 20 has merely to do with "procedure." This is indefensible. The last clause just quoted is a positive declaration of substantive law. It entirely defeats the pres-

ent indictment. The dispute set forth in this indictment and the specific acts alleged to have been done in the course thereof fall squarely within the definition and several "of the acts specified" in Section 20, both as to the alleged strike and as to the alleged boycott and as to the character of the dispute.

Even if the Sherman Law had ever been applicable to the facts alleged, Section 20 of the Clayton Act annuls such application.

Moreover, even disregarding this express substantive exemption, the rest of the section is a declaration not merely as to procedure, but also as to policy. It recognizes and asserts that labor disputes of the character specified are, and in the interest of the ultimate public welfare, must be outside of the competence of the courts, and should be left for adjustment and solution to methods and agencies other than those provided in the Sherman Law.

It is inconceivable that Congress would have exempted such acts from injunctive process if it intended to leave them as crimes.

(4) Moreover, in Section 2 of the Norris-LaGuardia Act (U. S. C. A., Title 29, Sec. 102), under the title "Public Policy in Labor Matters Declared", it is enacted that "the public policy of the United States" is that:

(1) the individual worker shall have the right, through "concerted activities", "to protect his freedom of labor";

(2) the individual worker shall have the right, through "concerted activities", to seek "to obtain acceptable terms and conditions of employment"; and

(3) the individual worker shall have the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

This Norris-LaGuardia Act (29 U. S. C. A. §§ 101-115) is but one of the many recent statutes passed with the purpose of declaring legal the activities with which the defendants herein are charged in order to give to labor organizations the protection which they require in order to survive.

In Section 113 (c) the term "labor dispute" is defined as follows:

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*"

This Act also forbids injunctive relief, in any case "involving or growing out of any labor dispute", against the following acts among others [Sec. 104 (a) and (e)]:

"Ceasing or refusing to perform any work or to remain in any relation of employment";

"*Giving publicity* to the existence of or the facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence."

It is apparent from the facts alleged in the indictment herein that the acts sought to be punished arose out of a "labor dispute" within the definition of the Norris-LaGuardia Act.

In the very recent decision of this Court in *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.* (decided November 18, 1940), this Court considered the effect of the Norris-LaGuardia Act as a definition of public policy and said:

"Whether or not one agrees with the committees that the cited cases constituted an unduly restricted

interpretation of the Clayton Act, one must agree that the committees and the Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act."

(4) This view has also been given judicial sanction in two other very recent cases. In *Donnelly Garment Co. v. International L. G. W. Union*, 20 Fed. Sup. 767, in discussing the effect of the Norris-LaGuardia Act on earlier interpretations of Section 20 of the Clayton Act, the Court said:

"The broad interpretation of the phrase 'labor dispute' just suggested is required by the very language of section 13 (now section 20). If there were any doubt about it, that doubt would be removed by a consideration of the report of the Judiciary Committee of the House of Representatives submitting the bill which became the act. In that report it is said that: 'Section 13 contains definitions which speak for themselves.' It is hardly necessary to discuss them other than to say that these definitions include, as hereinabove stated, a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of *Duplex Printing Press Co. v. Deering*, *supra*, 254 U. S. 443, 41 St. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196, wherein the Supreme Court reversed the Circuit Court of Appeals, 252 F. 722, and held that the inhibition of section 20 to the Clayton Act (29 U. S. C. A. § 52) only related to those occupying the position of employer or employee and no others."

And in *Grace Co. v. Williams*, 20 Fed. Supp. 263, the District Court for the Western District of Missouri said the same thing.

(5) The claim in the appellant's brief that the Norris-LaGuardia Act has to do only with "the equity powers of

the Federal Courts" (pp. 61-65) is clearly erroneous.

It overlooks the aforesaid express declaration in Section 2 of "the public policy of the United States" on the substantive rights of labor, and it overlooks also the inherent and implied declaration of public policy contained in the whole text and substance of the Act.

POINT VI

Another of the opposing brief's fundamental errors which organized labor must and does resist as fatal to its very existence, is its constant exclusion of the right to seek, gain and protect employment and to strike in defense thereof, from the normal and legitimate objects and operations of a labor union.

(1) This attempt by the opposing brief, and indeed by the indictment itself, reads into the Clayton Act and the Norris-LaGuardia Act a distinction and discrimination which is not there and which is contradicted by their express terms; and it seeks to subject to the stigma of the antitrust laws the most normal, primary and original of all labor's rights and objects.

Thus, in Paragraph 23 of the indictment, it is alleged that the demands of the millwrights

"did not in any way relate to the wage rates, hours of labor, or working conditions applicable to members of the United Brotherhood of Carpenters and Joiners of America in the employ of Anheuser-Busch, Inc., but involved only the claim that millwrights who were members of United Brotherhood of Carpenters and Joiners of America had exclusive jurisdiction over and the exclusive right to perform the work of erecting, assembling, installing and setting machinery".

Apparently, it is the Attorney-General's view that the legitimate objects of labor and their permissible "opera-

tion for the purposes of mutual help" "or other mutual aid or protection" (Clayton Act, Sec. 6; Norris-LaGuardia Act, Sec. 2) do not include the right to seek, gain or defend the right to work by the same actions which they may exert in furtherance of better wage rights, hours of labor or working conditions.

The same improperly limited definition of "the rights of labor" appears repeatedly in the Attorney-General's present brief. For example, at page 17:

"In the second place, the objective of the conspiracy was not the protection and advancement of the rights of labor, such as collective bargaining, wages, hours or working conditions."

But the right to seek, gain and protect employment is the parent of all these consequential rights, and without that primary and basic right they would never come into being or have a chance to be enjoyed.

(2) The appellant's brief seems to recognize the right of a union by strike and boycott to exert economic pressure "to bring about unionization" of a shop or industry (p. 58). But what is "unionization" except exclusive employment and jobs for the members of the striking union? And what more or worse was being done by the union mentioned in this indictment?

Indeed, in the present case, the aim was far less than the "unionization" of any shop—much less industry.

POINT VII

The indictment nowhere charges a secondary boycott. The very contrary appears.

The United Brotherhood had a perfect common law, statutory and constitutional right peacefully to endeavor to persuade its members and friends of organized labor to refrain from patronizing Anheuser-Busch beer, which was merely one of many products manufactured by the Anheuser-Busch Company.

(1) The indictment charges in paragraph 32 that the defendants

“instigated, promoted and brought about a boycott of beer brewed by Anheuser-Busch, Inc., and of dealers in said beer throughout the United States by distributing printed circulars and sending letters to local unions, councils and individual members of United Brotherhood of Carpenters and Joiners of America and of other trade and labor unions affiliated with American Federation of Labor and to members of the public at large in many of the states, and by publishing notices in ‘The Carpenter’ an official periodical publication of United Brotherhood of Carpenters and Joiners of America, circulated in all of the states of the United States, denouncing Anheuser-Busch, Inc., as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer, * * *.”

In other words, no more was done than is expressly permitted by Section 20 of the Clayton Act which says that, among the acts which shall not “be considered (or held to be violations of any law of the United States”, are:

“ceasing to patronize or to employ any party to such (labor) dispute, or recommending, advising, or persuading others by peaceful and lawful means so to do.”

And in Section 4 of the Norris-LaGuardia Act (U. S. C. A. Title 29, § 104) it is enacted that no court of the United States shall issue a temporary or permanent injunction against "doing, whether singly or in concert, any of the following acts":

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence."

(2) There is no allegation of any threats or of any violence used or offered.

It is conceded in the indictment (par. 11) that Anheuser-Busch is engaged not only in brewing beer but also in "manufacturing ice-cream cabinets, and producing other articles and commodities of commerce." There is no allegation whatever that the Union sought to persuade its members and friends of labor to refrain from patronizing any of these other articles and commodities of commerce produced by Anheuser-Busch, Inc. The attempt was aimed solely at this beer--nothing else.

The Anheuser-Busch Company is a wholesale manufacturer of beer. For the Union merely to have urged its members not to buy this beer at the plant itself would have been quite meaningless because that was not where retail purchases could or would have been made. The right to refrain from purchasing one of a number of products by a manufacturer deemed unfair to labor, and to peacefully attempt to persuade others to do likewise, is as elementary and well-settled a right of labor as the right to refuse to be employed by that manufacturer at all.

In the present case the dispute in the St. Louis plant of the Anheuser-Busch Company concerned certain work in the erection of a special tank building for the manufacture of beer; and, in consequence, it was from that Company's beer that the Union sought to persuade its members and friends of labor to withhold their patronage during the pendency of the dispute.

There is also no allegation that the "dealers" referred to in paragraph 32 did not, like the Anheuser-Busch Company itself, sell many products other than Anheuser-Busch beer. Indeed, the ordinary liquor dealer retails a large number and variety of alcoholic drinks manufactured by a large number of different brewers and distillers. There is no allegation that there was any attempt or purpose to cause the withdrawal of *all* patronage from such dealers.

We emphasize these considerations because an indictment, like all accusations or statutes imputing or defining crime, must be construed strictly, and nothing not stated can be supplied by mere inference or speculation.

(3) The opposing brief endeavors to construe paragraph 32 as if there were a period after the words "dealers in said beer throughout the United States." There is no such separation either in the thought or in the expression. Paragraph 32 is but a single sentence and expresses only a single and united thought. It describes in one breath the limited thing sought to be reduced in patronage, the limited method by which this was sought to be accomplished, the limited number of persons to whom the appeal was addressed, and the limited period during which the effort should endure.

If the draftsman of this indictment had had some other intent, he has failed to express it. He cannot now claim that something else was intended and can be spelled out by implication, ambiguity or repunctuating the sentence.

(4) The right to distribute circulars expressing an opinion and advocating acceptance of such opinion has recently been strikingly upheld by this Court in its notable opinion in *Schneider v. Irvington*; *Young v. California*; *Snyder v. Milwaukee*; and *Nichols v. Massachusetts*, 308 U. S. 147. In that case it was said (p. 161):

"This court has characterized the freedom of speech and that of the press as fundamental personal

rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."

See, also, "Picketing, Free Speech and Labor Disputes," Contemporary Law Pamphlet, 1940, Series 1, No. 25.

The right to send out the circulars did not depend on whether the opinion expressed therein could be made good before some tribunal. The right to criticize and to express opinion is not thus limited. There is no charge that the opinion was not sincerely entertained or that the purpose was other than to exert economic pressure in the effort to secure employment. Furthermore, since the right to speak existed and was constitutional, the motive cannot be called in question by indictment.

(5) This type of temporary boycott, as alleged in the indictment, is universally regarded as a lawful means of collective labor action.

Duplex Printing Co. v. Deering, 254 U. S. 443;

American Foundries v. Buck's Stove etc. Co., 33

App. Div. (N. Y.) 83, 123;

Gil Engraving Co. v. Doern, 214 Fed. 111;

Rosenberg v. Retail Clerks' Association, 39 Cal.

67;

Greenfield v. Central Labor Council, 104 Ore. 259.

Thus in the *Buck's Stove* case, *supra*, where respondent a labor federation, published complainant's name in its official organ under the caption "We Do Not Patronize" and "Unfair", the Court said at page 123:

"No one doubts, I think the right of the members of the American Federation of Labor to refuse to pat-

ronize employers whom it regards as unfair to labor. It may procure and keep a list of such employers, not only for the use of its members, but as notice to their friends that the employers whose names appear therein are unfair to labor. This list may not only be procured and kept available for the members of the Association and its friends, but it may be published in a newspaper, or a series of newspapers. To this extent they are within their Constitutional Rights: at least, where a Court of Equity cannot intervene."

The right of a labor union to publicize its opinion that some employer is unfair to labor is one of the oldest of labor's rights; and it is done every day on the signs and placards carried by pickets and in circulars more or less generally broadcast. Indeed since the "Carpenter" was not a periodical in general circulation, the notice referred to in the indictment would not reach the attention of as many persons as the placards and publicity which at times through pickets and otherwise have been simultaneously placed around or broadcast concerning the numerous plants of some of our large industrial concerns scattered through many states.

POINT VIII

The acts of the defendants as affecting Borsari Tank Corporation, Gaylord Container Corporation and L. O. Stocker Company were not a crime under the anti-trust laws.

(1) According to the express admission of paragraph 15 of the indictment, the Borsari Tank Corporation was merely the instrumentality through which the Anheuser-Busch Company was planning to construct the additional tank building.

The future work of assembling, installing and setting the machinery in such proposed new building was work which when it came to be done would be done either for the Anheuser-Busch Company directly or for the Borsari Tank Corporation as the representative of the Anheuser-Busch Company.

According to paragraphs 21 and 31 of the indictment, the millwrights did not strike until June 28, 1939, and then only after it became plain that the Anheuser-Busch Company, by signing a year's agreement on April 15, 1939, with the machinists awarding the latter the exclusive right to do this particular class of work in the proposed new building, had irrevocably taken sides and had rendered nugatory any right or effort on the part of the millwrights to have consideration or review of their claims.

The construction contract with the Borsari Tank Corporation was not made until shortly after the strike began (par. 15).

(2) As to the Gaylord Container Corporation and the L. O. Stocker Company there was no walkout or strike at all.

There is no allegation in the indictment that on June 28, 1939, or at any time previously thereto, either of these corporations had in its employ any member of the United Brotherhood of Carpenters and Joiners of America. The indictment merely alleges a refusal to *enter* the employ of either company.

Moreover, paragraph 18 of the indictment concedes that it was not until August 1, 1939, that the Gaylord Container Corporation made its contract with the L. O. Stocker Company to construct for it an additional office building on the premises leased by it from the Anheuser-Busch Company. This date—August 1, 1939—was over a month *after* (according to par. 31) the millwrights had struck as regards the proposed additional tank building

of the Anheuser-Busch Company, the contract for which latter building had been let in July, 1939 (par. 15).

Consequently, the indictment shows that *after* the millwrights had struck as regards the proposed new tank building of the Anheuser-Busch Company and had begun picketing the premises of the Anheuser-Busch Company, the Gaylord Container Corporation with its eyes open to the situation undertook to let a contract to erect on these very premises of the Anheuser-Busch Company a new office building the fee of which would belong at once to the Anheuser-Busch Company and the possession of which would, at the expiration of the lease from the Anheuser-Busch Company (the duration of which lease is not stated), revert to that company. It is difficult to see what grievance the Gaylord Container Corporation and the L. O. Stocker Company could possibly have under these circumstances.

All that appears in the indictment is that the members of the United Brotherhood of Carpenters and Joiners of America refused to go through their own picket line and enter the picketed premises of the Anheuser-Busch Company and there assist in erecting a building which would immediately become the property of the Anheuser-Busch Company (par. 34). Thereby they merely exercised an elementary right as free men.

(3) Furthermore, there is no allegation that any employee of the Gaylord Container Corporation or of the L. O. Stocker Company quit, or walked out or struck; and there is no allegation that the defendants or anyone else asked or sought to persuade any employee of either company to quit, or walk out or strike, or asked or sought to persuade any one not a member of the Brotherhood not to enter the employ of either of these companies. There is no allegation that the defendants or anyone else refrained or sought to induce others to refrain from patronizing products or merchandise of either company; and there is

not even an allegation that there was any representation that either company was "unfair to labor."

The only charge of unfairness to labor which the indictment says was made by the Brotherhood was limited to the Anheuser-Busch Company (par. 31),—the allegation being that the picketing about the Anheuser-Busch Company premises was (par. 31):

"by persons bearing umbrellas and charging Anheuser-Busch, Inc., to be unfair to organized labor."

There is absolute freedom in a labor union's power to set conditions for acceptance of employment in the first instance. In other words, employees have as much right to choose employers as the employers have to choose their labor.

Rutan Co. v. Labor Union No. 4, 97 N. J. Eq. 77;
Barber Printing Co. v. Brotherhood of Painters,
etc., 23 Fed. (2d) 743;

Ramsbush Decorating Co. v. Brotherhood of Painters, 105 Fed. (2d) 134.

(3) Moreover, nothing could be more remote, indirect and inconsequential than the alleged effect on interstate commerce of the aforesaid refusal to work for Borsari, Gaylord and Stocker (*Industrial Association v. U. S.*, 268 U. S. 64, 80).

POINT IX

Moreover, quite aside from the indictment's omission to show any crime against the anti-trust laws, the indictment even fails to show that the Brotherhood was morally or legally bound to submit to the unilateral decision of the Anheuser-Busch Company awarding to the machinists by contract the exclusive right to this particular class of work at the very time when the construction contract was about to be let.

(1) The indictment admits that for years the Millwrights' Union and the Machinists' Union had had a more or less running dispute over the erection and dismantling of certain kinds of machinery (par. 19). The indictment fails to allege that the Brotherhood's long-standing claim on behalf of its millwrights had been advanced and maintained in bad faith or without color of merit, or that as to the new work of this character about to become available in this particular plant the Brotherhood did not sincerely believe itself not bound by the unilateral action of the Anheuser-Busch Company thereon.

The alleged agreement to arbitrate (par. 22) is not shown to have applied to a matter of jurisdiction, particularly over the new work and as to new jobs. Apparently the class of grievance to which the agreement applied was only such an individual grievance as could be settled by "adjustment by conference between a shop steward of the union and the foreman of the employer" (par. 22). The arbitration referred to, according to the language of the indictment, applied only to such grievances as fell within that method of adjustment but failed to be adjusted thereby. Obviously, that class of grievance and that method of adjustment could not embrace the question of jurisdiction over the new work of erecting and installing machinery in the proposed new tank building.

(2) But, however this may be and in any event, any possible use of the arbitration agreement had, just prior to the strike of the millwrights, been nullified by the unilateral action of the Anheuser-Busch Company in awarding this very work and these very jobs to the machinists by an exclusive contract.

The strike did not take place until June 28, 1939 (par. 31). The proposed new tank building had been submitted by the Anheuser-Busch Company to the Borsari Tank Corporation for a proposal as early as February, 1939 (par. 15); and on April 15, 1939, the Anheuser-Busch Company had made a written contract with the Machinists' Union for one year, which contract expressly provided that machinists should do the "erecting, assembling, installing and repairing of all metal machinery or parts thereof" (par. 21). There is no allegation that the Anheuser-Busch Company afforded the United Brotherhood of Carpenters and Joiners of America any prior opportunity to arbitrate such *ex parte* determination on its part, or even to be heard in connection with the making of it.

In other words, the making of this contract represented the voluntary action of the employer in irrevocably deciding *ex parte* and against the millwrights the whole issue as between them and the machinists, an issue of which the employer was admittedly fully aware at the time (par. 19).

Moreover, this *ex parte* making of that contract with the machinists nullified any chance whatever of thereafter having the Anheuser-Busch Company arbitrate the millwrights' claim to this new work. There is no allegation of any contemporaneous arbitration agreement between the United Brotherhood and the Machinists' Union or of any willingness on the latter's part to permit review of the exclusive contract which they had obtained. In consequence, since the Anheuser-Busch Company had by its own act put the subject outside the realm of discussion, it could not with much grace assume the role of a cry-baby when the millwrights walked out.

(3) It is no answer to say that the Brotherhood on June 28, 1939, knew of the contract which on April 13, 1939, the Anheuser-Busch Company had made with the Machinists' Union, for it was the *ex parte* making of that very contract and the action of the employer in the fulfillment thereof which constituted the grievance. The agreement between the Anheuser-Busch Company and the Machinists' Union, knowledge of which is charged to the defendants, was knowingly made in violation of the very claims which the Brotherhood had consistently put forward.

(4) But, as shown by the indictment itself, not even this was the full extent of the grievance of the United Brotherhood.

Paragraph 19 alleges that on October 24th, 1932, the United Brotherhood and the Machinists' Union had signed a "tentative understanding" whereby the work of erecting and installing machinery was divided between the two unions in such wise that the jurisdiction of the former's millwrights would extend over "line shafting, pulleys and hangers, spouting and chutes, all conveyors, lifts and hoists, except that type of conveyor that is an integral part of the machine."

Paragraph 21 alleges that, notwithstanding this agreement for a specified division of the work, the machinists made on April 15, 1932 a one year contract with the Anheuser-Busch Company for the exclusive right of erecting and installing "all metal machinery or parts thereof", a contract in obvious violation of the "tentative understanding" arrived at between these two national unions in the preceding year, as alleged in paragraph 19.

In consequence, as is conceded in paragraph 18, on April 14, 1933, to wit, the day before this exclusive contract applicable to the Anheuser-Busch plant came up for renewal, the United Brotherhood served notice of its

withdrawal from the tentative understanding—evidently because of the breach thereof by the Machinists' Union and because of the desire of the United Brotherhood to be in a position to protest against the repetition of such a breach by a renewal of the aforesaid exclusive contract between the Anheuser-Busch Company and the Machinists' Union.

Nevertheless, as is conceded in paragraph 21, the Anheuser-Busch Company did immediately renew that exclusive contract on April 15, 1933 (the very day it expired) and annually thereafter again renewed it down to and including the year commencing April 15, 1939. It is evident, therefore, that for some six years the United Brotherhood was protesting the annual repetition of the renewal of this exclusive contract awarding the whole work to the machinists; and that the millwrights patiently refrained from striking, until, on June 28, 1939, it became evident that under the renewal of the said contract on April 15, 1939, the machinists were even to receive the exclusive right to all this work in the proposed new tank building.

(5) We cannot assume for a moment that this indictment is to be used from the point of view of the private interest or even the alleged rights of Anheuser-Busch; or that Anheuser-Busch can, by making a unilateral decision in favor of the machinists, suddenly turn into a crime the United Brotherhood's continued insistence on the jurisdiction which it has always claimed for its millwrights. Otherwise, the unilateral decision of Anheuser-Busch would become part of the penal law of the United States of America.

POINT X

The opposing brief overlooks altogether the familiar rules applicable to the construction of an indictment.

These rules are:

1. Since the Sherman Law is generic in its language, mere repetition of the language of the statute is not sufficient, but facts constituting the offense must be alleged.

In re Greene, 52 Fed. 104;

U. S. v. Nelson, 52 Fed. 646;

U. S. v. Patterson, 55 Fed. 605;

U. S. v. Winslow, 195 Fed. 578 (aff'd, 227 U. S. 202);

U. S. v. Cowell, 243 Fed. 730;

U. S. v. Cruikshank, 92 U. S. 542;

Batchelor v. U. S., 156 U. S. 426;

U. S. v. Hess, 124 U. S. 483;

U. S. v. Britton, 107 U. S. 655;

Donegan v. U. S., 296 Fed. 843;

Middlebrooks v. U. S., 23 Fed. (2d) 244.

2. The sufficiency of the indictment must be judged exclusively from the facts alleged and not from the conclusions, characterizations and epithets of the pleader. (*U. S. v. Cruikshank*, 92 U. S. 543; *Batchelor v. U. S.*, 156 U. S. 426.)

3. An indictment must be construed strictly, to wit, against the pleader. (31 *Corpus Juris*, Sec. 186, p. 667.)

4. All the material facts and circumstances embraced in the definition of the offense must be stated, or the in-

dictment will be defective. (*U. S. v. Hess*, 124 U. S. 483, 486.)

5. Any omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital. (*U. S. v. Hess*, 124 U. S. 483, 486; *Asgill v. U. S.*, 60 Fed. (2) 780.)

6. An inadequate statement of facts cannot be cured by invective or characterization. (*Middlebrooks v. U. S.*, 23 F. (2d) 244; *U. S. v. Fuselier*, 46 F. (2d) 568.)

CONCLUSION

The decision of the court below should be affirmed.

Dated, December 4, 1940.

Respectfully submitted,

CHARLES H. TUTTLE,
BRYAN PURTEET,
JOSEPH O. CARSON,
THOMAS E. KERWIN,
JOSEPH O. CARSON, II,
Counsel for Appellees.

[APPENDIX FOLLOWS]

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

Decided 11/4/40

UNITED STATES,

Appellee,

v.

BENJAMIN GOLD, and others,

Appellants.

Appeals from judgments of conviction of the District Court for the Southern District of New York for a conspiracy under the Sherman Act.

Before—L. HAND, SWAN and AUGUSTUS N. HAND,
Circuit Judges.

KENNETH E. WALSER for the appellants;
BERKELEY W. HENDERSON for the appellee.

L. HAND, C. J.:

These appeals are from judgments of conviction of the accused for a conspiracy to restrain trade in violation of the Sherman Act. The only question we shall consider is whether the evidence supports the verdict, the facts which the jury might have found to be proved being as follows: About ninety per cent. of the manufacturers of fur garments in the United States do their business in the City of New York, buying the raw skins from dealers who have imported them from foreign countries and other states.

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The first process of manufacture is dressing and dyeing which the manufacturer ordinarily does not do himself; he contracts for this service with dressers and dyers who have their own factories and employ their own workmen and most of whom are in New Jersey. Thus skins must cross the state line twice before they return to the manufacturers to be cut and sewn. At the time of the conspiracy, the year 1932, the Needle Trades Workers' Industrial Union, a large nation-wide union had established itself in the fur business in New York, though its hold there was as yet small. Most of the business had already been unionized by the International Fur Workers, another large union; the rest was not unionized at all. The Needle Workers started a campaign to bring the whole industry within their union, including not only employees of the manufacturers but of the dressers and dyers as well. Among the dressers and dyers were three large firms in Newark, New Jersey: A. Hollander and Son, Joseph Hollander, Inc., and Philip A. Singer & Brother. All of these operated non-union plants, and the officers of the Needle Workers—the accused at bar—directed their main attack against them, striving to compel them to employ only the union's own members. The means they used to accomplish this were in general to picket the factories and persuade employees to join the union, to warn the New York manufacturers not to send their skins to them to be dressed and dyed and to direct their own members in the New York manufacturers' plants to refuse to work up any skins dressed and dyed by the offending three firms. There was abundant evidence from which a jury could find that this three-fold attack was carried out with utter lawlessness and violence; and there can be no question that if the strikes did in fact restrain trade within the meaning of the Sherman Act, the restraints used were "unreasonable" to the last degree.

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The case was tried before the decision of the Supreme Court in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, before which it had been quite commonly supposed that the Sherman Act covered, not only concerted action intended to control prices or supply, or resulting in such control, but generally all action which so far affected interstate commerce as to be within the constitutional power of Congress at all; that is, that Congress in the Sherman Act had meant to exercise its power as broadly as possible. This view the court repudiated in the *Apex* case. Its reasoning was that the act had been passed only to implement the common law as to restraints of trade; and that, although it imposed its own liabilities, civil and criminal, besides providing remedies for their breach, nevertheless it took the common law as its model, creating federal rights and duties fashioned after existing precedents. So much the court had often said before, and the new contribution was that, turning to those precedents, it now held that the only restraints forbidden were those which limited competition in "business and commercial transactions," and which "tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services," p. 493. These were no chance words; they were the burden of the reasoning by which the court affirmed a reversal by the circuit court of appeals. For example, the contracts must be "for the restriction or suppression of competition in the market, agreement to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or customers the advantages which accrue to them from free competition in the market" (p. 497). Again, "restraints upon competition have been condemned only when their purpose or effect was to raise or

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fix the market price" (p. 500). See also pp. 501, 507, 512. Mere restraints upon transportation of goods across state lines were therefore not enough; they must be in execution of a plan to restrict market competition, or that must be their necessary result. Furthermore, the argument was necessary to the decision because not only had the "sit-down" strikers entirely stopped the manufacture of goods, 80 per cent of which would have gone into interstate commerce; but their leader expressly refused to allow any finished goods—of which there was a large amount on hand—to leave the factory. It was a complete answer to these wrongs—which the court condemned without stint—that the plaintiff had not shown that the strike had had any substantial commercial effect upon either the prices at which the goods were sold or the supply upon the market, and that they had not prejudiced consumers in any other way.

So far as concerns the skins themselves, the case at bar is even weaker; for, although the accused tried to stop any raw skins from crossing from New York to New Jersey to be dressed and dyed by the Hollanders and Singer and from returning to New York to be cut and sewn, they did not by so doing interfere with marketing of any kind. Dressing, dyeing, cutting and sewing are all processes in the manufacture of garments; the skins were not sold to the dressers and dyers, nor were they resold by them to the manufacturers, moreover, so far as appears, the price and supply of the resulting garments were not in fact affected by the strike. We may assume *arguendo* that, if the dealers had sent the skins to the dressers and dyers and sold them to the manufacturers from the dressing and dyeing plants, a combined refusal to work up such skins—if "widespread" enough to affect prices or supply—would have been in "restraint of trade"; but there is no evidence in the record that any part of the business was done in that way.

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Nevertheless, there may be a restraint of trade in services as well as in goods, and the argument we have just made will not hold as to the service of dressing and dyeing. We must not indeed confuse the services to their employers of the employees of the Hollanders and Singer with the services of the Hollanders and Singer to the manufacturers. There can be no question that the accused intended to acquire a monopoly of the whole supply of the services rendered by the employees; that is indeed the object of most unions. But the court in the *Apex* case expressly declared that the Sherman Act did not cover any restraint of competition in such services (pp. 502, 503) and we must therefore disregard any effect upon them which the accused may have intended or caused. Coming then to the service of the dressers and dyers, they picked up the skins in New York, dressed and dyed them in New Jersey and returned them to the manufacturers in New York; and, as all this was done by a single contract, they must be held to have sold to the manufacturers a service in substantial measure interstate. The accused therefore restrained the "marketing" of an interstate service, as they did not restrain the "marketing" of the skins themselves. It is true that their purpose was not to control prices or supply; they were indifferent to these except as a sanction for bending the three obdurate firms to their will. But purpose is never an excuse in these cases; only the intent of the accused, or the necessary result of his conduct, counts, and it would appear enough that here they intended to stop all "marketing" of service. So far, therefore, the case at bar is on all fours with a number of earlier decisions, except that they dealt with goods instead of services. *Loewe v. Lawlor*, 208 U. S. 274; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443; *Coronado Coal Co. v. United Mine Workers*, 268 U. S.

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295; *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association*, 274 U. S. 37. Nevertheless there was one element lacking which was present in the decisions just cited, and which the court thought crucial in the *Apex* case. Although the accused at bar intended to stop the marketing of the services of the three recalcitrant firms, the operations of those firms were not shown to have been upon a large enough scale to make their cessation affect market conditions in New York. That that is now an essential element appears from the following extract out of the opinion in the *Apex* case: "It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at the control of the market and were so widespread as substantially to affect it" (p. 506). That can only mean that unless the strike is so "widespread" as to affect prices or supply, it is not "restraint of trade", even though it is directed against the "marketing" of goods or services. It is certainly not for us to say how far the four decisions cited lend themselves to such a distinction; the court itself was not unanimous upon the point. We have only to follow the decision made.

Convictions reversed.

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BAB. PRESS, INC., 47 WEST ST., NEW YORK. BO.

[3690]

SUPREME COURT OF THE UNITED STATES.

No. 43.—OCTOBER TERM, 1940.

United States of America, Appellant,	}	Appeal from the District Court of the United States for the Eastern District of Missouri.
vs.		
William L. Hutcheson, George Casper		
Ottens, John A. Callahan, and Joseph		
August Klein.		

[February 3, 1941.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. § 1, is the question. It is sharply presented in this case because it arises in a criminal prosecution. Concededly an injunction either at the suit of the Government or of the employer could not issue.

Summarizing the long indictment, these are the facts. Anheuser-Busch, Inc., operating a large plant in St. Louis, contracted with Borsari Tank Corporation for the erection of an additional facility. The Gaylord Container Corporation, a lessee of adjacent property from Anheuser-Busch, made a similar contract for a new building with the Stocker Company. Anheuser-Busch obtained the materials for its brewing and other operations and sold its finished products largely through interstate shipments. The Gaylord Corporation was equally dependent on interstate commerce for marketing its goods, as were the construction companies for their building materials. Among the employees of Anheuser-Busch were members of the United Brotherhood of Carpenters and Joiners of America and of the International Association of Machinists. The conflicting claims of these two organizations, affiliated with the American Federation of Labor, in regard to the erection and dismantling of machinery had long been a source of controversy between them. Anheuser-Busch had had agreements with both organizations whereby the Machinists were given the disputed jobs and the Carpenters

agreed to submit all disputes to arbitration. But in 1939 the president of the Carpenters, their general representative, and two officials of the Carpenters' local organization, the four men under indictment, stood on the claims of the Carpenters for the jobs. Rejection by the employer of the Carpenters' demand and the refusal of the latter to submit to arbitration were followed by a strike of the Carpenters, called by the defendants against Anheuser-Busch and the construction companies, a picketing of Anheuser-Busch and its tenant, and a request through circular letters and the official publication of the Carpenters that union members and their friends refrain from buying Anheuser-Busch beer.

These activities on behalf of the Carpenters formed the charge of the indictment as a criminal combination and conspiracy in violation of the Sherman Law. Demurrers denying that what was charged constituted a violation of the laws of the United States were sustained (32 F. Supp. 600) and the case came here under the Criminal Appeals Act. Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. § 682; Judicial Code § 238, 28 U. S. C. § 345.

In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States*, 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court.

Section 1 of the Sherman Law on which the indictment rested is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." The controversies engendered by its application to trade union activities and the efforts to secure legislative relief from its consequences are familiar history. The Clayton Act of 1914 was the result. Act of October 15, 1914, 38 Stat. 730. "This statute was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the posi-

tion of workingmen and employer as industrial combatants." *Duplex Co. v. Deering*, 254 U. S. 443, 484. Section 20 of that Act, which is set out in the margin in full,¹ withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States". The Clayton Act gave rise to new litigation and to renewed controversy in and out of Congress regarding the status of trade unions. By the generality of its terms the Sherman Law had necessarily compelled the courts to work out its meaning from case to case. It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove. Specifically the courts restricted the scope of § 20 to trade union activities directed against an employer by his own employees. *Duplex Co. v. Deering*, *supra*. Such a view it was urged, both by powerful judicial dissents and informed lay opinion, misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts. *Ibid.*, p. 485-486. Agitation again led to legislation

¹ 38 Stat. 738, 29 U. S. C. § 52: "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

and in 1932 Congress wrote the Norris-LaGuardia Act. Act of March 23, 1932, 47 Stat. 70, 29 U. S. C. §§ 101-115.

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict,² and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States". So long as a union acts in its self-interest and does not combine with non-labor groups,³ the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of § 20 that differentiates between trade union conduct directed against an employer because of a

² "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

³ Cf. *United States v. Brims*, 272 U. S. 549, involving a conspiracy of mill work manufacturers, building contractors and union carpenters.

controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying that Congress has made § 20 inapplicable to trade union conduct resulting from them.

In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for increased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it.

It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by § 20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by § 20 for "terminating any relation of employment", or "ceasing to perform any work or labor", or "recommending, advising, or persuading others by peaceful means so to do". The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working". Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do".

Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct. But we need not determine whether the conduct is legal within the restrictions which *Duplex Co. v. Deering* gave to the immunities of § 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a "labor dispute" in terms that no longer leave room for doubt. *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U. S. —. This was done, as we recently said, in order to "obviate the results of the judicial construction" theretofore given the Clayton Act. *New Negro Alliance v. Grocery Company*, 303 U. S. 552, 562; see *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 507, n. 26. Such a dispute, § 13(c) provides, "includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee".⁴ And under § 13(b) a person is "participating or interested in a labor dispute" if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation".

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is

⁴ Three years later, in the National Labor Relations Act, Congress gave similar breadth to the definition of a labor dispute. Act of July 3, 1935, 49 Stat. 448, 450, 29 U. S. C. § 152(9).

not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that endues the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 Fed. 30, 32.

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L., 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. Rep. No. 669, 72d Congress, 1st Session, p. 3. The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering*, *supra*, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association*, 274 U. S. 37, as the authoritative interpretation of § 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by

infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States", including the Sherman Law.

There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment are made lawful by the Clayton Act in so far as "any law of the United States" is concerned, it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. Cf. *Apex Hosiery Co. v. Leader*, 310 U. S. 469. It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure.

Affirmed.

Mr. Justice MURPHY took no part in the disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 43.—OCTOBER TERM, 1940.

The United States of America, Appellant,	} Appeal from the Dis-	
vs.		trict Court of the
William L. Hutcheson, George Casper		United States for the
Ottens, John A. Callahan, and Joseph		Eastern District of
August Klein.	Missouri.	

[February 3, 1941.]

Mr. Justice STONE, concurring.

As I think it clear that the indictment fails to charge an offense under the Sherman Act, as it has been interpreted and applied by this Court, I find no occasion to consider the impact of the Norris-LaGuardia Act on the definition of participants in a labor dispute in the Clayton Act, as construed by this Court in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443—an application of the Norris-LaGuardia Act which is not free from doubt and which some of my brethren sharply challenge.

The indictment is for a conspiracy to promote by peaceful means a local "jurisdictional" strike in St. Louis, Missouri. Its aim is to determine whether the United Brotherhood of Carpenters or the International Association of Machinists, both labor organizations affiliated with the American Federation of Labor, shall be permitted to install certain machinery on the premises of Anheuser-Busch, Inc. in St. Louis. It appears that Anheuser-Busch brews beer and manufactures other products which it ships to points outside the state. It also uses supplies and building materials which are shipped to it from points outside the state. Borsari Tank Corporation is about to construct for Anheuser-Busch upon its premises a building for its use in brewing beer. L. O. Stocker Company has contracted and intends to construct an office building upon land of Anheuser-Busch adjacent to its brewery and leased by it to the Gaylord Container Corporation, a manufacturer of paper and cardboard containers which it ships in interstate commerce. It is alleged that both Borsari and Stocker will require and use in the construction of

the buildings, materials to be shipped from points outside the state to the building sites on or adjacent to the Anheuser-Busch premises.

The indictment charges that pursuant to the conspiracy to enforce the jurisdictional demands appellees, who are officers or representatives of the Brotherhood, called a strike of its members, some seventy-eight in number, in the employ of Anheuser-Busch, attempted to call sympathy strikes by members of other unions in its employ and caused the premises of Anheuser-Busch and the adjacent premises leased to Gaylord to be picketed by persons "bearing umbrellas and charging Anheuser-Busch, Inc. to be unfair to organized labor; with the intent to shut down the brewery and manufacturing plant of Anheuser-Busch, Inc., to hinder and prevent the passage of persons and property to and from said premises and thus to restrain and stop the commerce of Anheuser-Busch" in the beer and other products manufactured by it, and in the supplies and materials procured by it extrastate, and "to restrain the commerce" of Gaylord. It is alleged that pursuant to the conspiracy, defendants "refused to permit members of the United Brotherhood . . . to be employed and prevented such members from being employed by Borsari . . . with the intent and effect of preventing construction of the building about to be built by Borsari . . . and thus of restraining the commerce of Anheuser-Busch in beer . . . and also with the knowledge and willful disregard of the consequent restraint and stoppage of commerce in the materials intended to be used by Borsari". Like allegations are made with respect to Stocker with the added charge that the acts alleged were with intent to prevent performance of Stocker's contract with Gaylord "with willful disregard of the consequent restraint of the commerce of Gaylord".

There is the further allegation that pursuant to the conspiracy defendants and their co-conspirators have instigated and brought about a "boycott of beer brewed by Anheuser-Busch . . . and of dealers in said beer throughout the United States", by distributing to members of labor organizations and to the public at large in many states and by published notices circulated interstate "denouncing Anheuser-Busch, Inc. as unfair to organized labor and calling upon all union members and friends of organized labor to refrain from purchasing and drinking said beer".

We are concerned with the alleged activities of defendants, actual or intended, only so far as they have an effect on commerce pro-

hibited by the Sherman Act as it has been amended or restricted in its operation by the Clayton Act. The legality of the alleged restraint under the Sherman Act is not affected by characterizing the strike, as this indictment does, as "jurisdictional" or as not within the "legitimate object of a labor union". The restraints charged are of two types: One is that resulting to the commerce of Anheuser-Busch, Borsari, Stocker and Gaylord from the peaceful picketing of the Anheuser-Busch premises, a part of which is leased to Gaylord, and the refusal of the Brotherhood to permit its members to work, and its prevention of its members from working (by what means other than picketing does not appear) for Borsari and Stocker. The other is that resulting from the requests addressed to the public to refrain from purchasing Anheuser-Busch beer.

It is plain that the first type of restraint is only that which is incidental to the conduct of a local strike and which results from closing the plant of a manufacturer or builder who ships his product in interstate commerce, or who procures his supplies from points outside the state. Such restraints, incident to such a strike, upon the interstate transportation of the products or supplies has been repeatedly held by this Court, without a dissenting voice, not to be within the reach of the Sherman Anti-Trust Act. There is here no allegation in the case of any of the employers of any interference, actual or intended, by strikers with goods moving or about to be shipped in interstate commerce such as was last term so sharply presented and held not to be a violation of the Sherman Act in *Apex Hosiery Co. v. Leader*, 310 U. S. 469.

With respect to Borsari and Stocker the indictment does no more than charge a local strike to enforce the jurisdictional demands upon Anheuser-Busch by the refusal of union members to work in the construction of buildings for Anheuser-Busch or upon its land, the work upon which, so far as appears, has not even begun. The restraint alleged is only that resulting from the "disregard" by the strikers of the stoppage of the movement interstate of the building materials and the manufactured products of Gaylor consequent upon their refusal to construct the buildings. Precisely as in *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, where a local building strike with like consequences was held not to violate the Sherman law, there is wanting here any fact to show that the conspiracy

was directed at the use of any particular building material in the states of origin and destination or its transportation between them "with the design of narrowing or suppressing the interstate market", each of which were thought to be crucial in *Bedford Co. v. Stone Cutters Ass'n*, 274 U. S. 37, 46-47. See *Apex Hosiery Co. v. Leader*, *supra*, 506.

As to the commerce of Anheuser-Busch and Gaylord, the indictment at most shows a conspiracy to picket peacefully their premises and publicly to charge the former with being unfair to organized labor, all with the intent to shut down the plant of Anheuser-Busch and to hinder and prevent the passage of persons and property to and from the premises and thus to restrain the commerce of Anheuser-Busch and Gaylord. There is also the allegation already noted that the refusal to work for Stocker will restrain the commerce of Gaylord, presumably because he will manufacture and ship less of his product if the proposed building is not completed.

It is a novel proposition that allegations of local peaceful picketing of a manufacturing plant to enforce union demands concerning terms of employment accompanied by announcements that the employer is unfair to organized labor is a violation of the Sherman Act whatever effect on interstate commerce may be intended to follow from the acts done. They, like the allegations here, show only such effect upon interstate commerce as may be inferred from the acts alleged and in any event such restraint as there may be is not shown to be more than that which is incidental to every strike causing a shutdown of a manufacturing plant whose product moves in interstate commerce or stopping building operations where the builder is using materials shipped to him in interstate commerce. If the counts of the indictment which we are now considering make out an offense, then every local strike aimed at closing a shop whose products or supplies move in interstate commerce is, without more, a violation of the Sherman Act. They present a weaker case than those unanimously held by this Court not to involve violation of the Sherman Act in *United Mine Workers v. Coronado Coal Co.* (First Coronado Case), 259 U. S. 344; *United Leather Workers v. Herkørt*, 265 U. S. 457; *Levering & Garrigues Co. v. Morrin*, *supra*, and see *Coronado Coal Co. v. United Mine Workers* (Second Coronado Case), 268 U. S. 295, 310. In any case there is no allegation in the indictment

that the restraint did or could operate to suppress competition in the market of any product and so dismissal of these counts is required by our decision in *Apex Hosiery Co. v. Leader*, *supra*.

The second and only other type of restraint upon interstate commerce charged is the so-called "boycott" alleged to be by the publication of notices charging Anheuser-Busch with being unfair to labor and requesting members of the Union and the public not to purchase or use the Anheuser-Busch product. Were it necessary to a decision I should have thought that, since the strike against Anheuser-Busch was by its employees and there is no intimation that there is any strike against the distributors of the beer, that the strike was a labor dispute between employer and employees within the labor provisions of the Clayton Act as they were construed in *Duplex Printing Press Co. v. Deering*, *supra*. In that case § 20 of the Act, as the opinion of the Court points out, makes lawful the action of any person¹ "ceasing to patronize . . . any party to such dispute" or "recommending, advising or persuading others by peaceful and lawful means so to do."

Be that as it may, it is a sufficient answer to the asserted violation of the Sherman Act by the publication of such notices and requests, to point out that the strike was by employees of Anheuser-Busch; that there was no boycott of or strike against any purchaser of Anheuser-Busch beer by any concerted action or refusal to patronize him by the purchase of beer or other products supplied by him such as was condemned in *Loewe v. Lawlor*, 208 U. S. 274, 300-307; cf. *Apex Hosiery Co. v. Leader*, *supra*, 505; and finally that the publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress. See *Thornhill v. Alabama*, 310 U. S. 88.¹

I can only conclude that, upon principles hitherto recognized and established by the decisions of this Court, the indictment charges no violation of the Sherman Act.

¹ Appellees, being national and local officers of the Brotherhood and representing the employees in the labor dispute with their employer, are "proximately and substantially concerned" as parties to an actual dispute and are, therefore, entitled to the benefits of the Clayton Act. See *Duplex Printing Press, Co. v. Deering*, *supra*, 470, 471.

SUPREME COURT OF THE UNITED STATES.

No. 43.—OCTOBER TERM, 1940.

The United States of America, Appellant,	}	Appeal from the District Court of the United States for the Eastern District of Missouri.
<i>vs.</i>		
William L. Hutcheson, George Casper		
Ottens, John A. Callahan and Joseph August Klein.		

[February 3, 1941.]

Mr. Justice ROBERTS.

I am of opinion that the judgment should be reversed.

The indictment adequately charges a conspiracy to restrain trade and commerce with the specific purpose of preventing Anheuser-Busch from receiving in interstate commerce commodities and materials intended for use in its plant; of preventing the Borsari Corporation from obtaining materials in interstate commerce for use in performing a contract for Anheuser-Busch, and of preventing the Stocker Company from receiving materials in like manner for the construction of a building for the Gaylord Corporation. The indictment further charges that the conspiracy was to restrain interstate commerce flowing from Missouri into other states of products of Anheuser-Busch and generally to restrain the interstate trade and commerce of the three corporations named.¹

Without detailing the allegations of the indictment, it is sufficient to say that they undeniably charge a secondary boycott, affecting interstate commerce.

This court, and many state tribunals, over a long period of years, have held such a secondary boycott illegal. In 1908 this court held such a secondary boycott, instigated to enforce the demands of a labor union against an employer, was a violation of the Sherman Act and could be restrained at the suit of the employer.² It is matter of history that labor unions insisted they were not within the purview of the Sherman Act but this court held to the contrary.

¹ C. E. Stevens Co. v. Foster & Kleiser Co., No. 41, Oct. T. 1940.

² Loewe v. Lawlor, 208 U. S. 274.

As a result of continual agitation the Clayton Act was adopted. That Act, as amended, became effective October 15, 1914.³ Subsequently suits in equity were brought to restrain secondary boycotts similar to those involved in earlier cases. The contention was made that the Clayton Act exempted labor organizations from such suits. That contention was not sustained.⁴ Upon the fullest consideration, this court reached the conclusion that the provisions of Section 20 of the Clayton Act governed not the substantive rights of persons and organizations but merely regulated the practice according to which, and the conditions under which, equitable relief might be granted in suits of this character. Section 6 has no bearing on the offense charged in this case.

This court also unanimously held that a conspiracy such as is charged in the instant case renders the conspirators liable to criminal prosecution by the United States under the anti-trust acts.⁵

It is common knowledge that the agitation for complete exemption of labor unions from the provisions of the anti-trust laws persisted. Instead of granting the complete exemption desired, Congress adopted, March 23, 1932, the Norris-LaGuardia Act.⁶ The title and the contents of that Act, as well as its legislative history,⁷ demonstrate beyond question that its purpose was to define and to limit the jurisdiction of federal courts sitting in equity. The Act broadens the scope of labor disputes as theretofore understood, that is, disputes between an employer and his employes with respect to wages, hours, and working conditions, and provides that before a federal court can enter an injunction to restrain illegal acts certain preliminary findings, based on evidence, must be made. The Act further deprives the courts of the right to issue an injunction against the doing of certain acts by labor organizations or their members. It is unnecessary to detail the acts as to which the jurisdiction of a court of equity is abolished. It is sufficient to say, what a reading of the Act makes letter clear, that the jurisdiction of actions for damages authorized by the Sherman Act, and of the

³ c. 323, 38 Stat. 730.

⁴ Duplex Printing Press Co. v. Deering, 254 U. S. 443; Bedford Cut Stone Co. v. Journeymen Stone Cutters Association, 274 U. S. 37.

⁵ United States v. Brims, 272 U. S. 549.

⁶ c. 90, 47 Stat. 70; 29 U. S. C. §§ 101-115.

⁷ S. Rep. No. 163, 72d Cong., 1st Sess., pp. 7-8; H. Rep. No. 669, 72d Cong., 1st Sess., pp. 2-3; 75 Cong. Rec. 5464, 5467.

criminal offenses denounced by that Act, are not touched by the Norris-LaGuardia Act.

By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change of policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.⁸

The construction of the act now adopted is the more clearly inadmissible when we remember that the scope of proposed amendments and repeals of the anti-trust laws in respect of labor organizations has been the subject of constant controversy and consideration in Congress. In the light of this history, to attribute to Congress an intent to repeal legislation which has had a definite and well understood scope and effect for decades past, by resurrecting a rejected construction of the Clayton Act and extending a policy strictly limited by the Congress itself in the Norris-LaGuardia Act, seems to me a usurpation by the courts of the function of the Congress not only novel but fraught, as well, with the most serious dangers to our constitutional system of division of powers.

The CHIEF Justice joins in this opinion.

⁸ The rule always heretofore followed in respect of implied repeal was recently expounded in an analogous situation in *United States v. Borden Co.*, 308 U. S. 188, 198.